No. 12691.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROYAL INDEMNITY COMPANY, a corporation,

Appellant,

vs.

GEORGE N. OLMSTEAD,

Appellee.

APPELLEE'S BRIEF.

C. PAUL DUBOIS,
515 Van Nuys Building,
Los Angeles 14, California,
Attorney for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Statement of Pleadings and Facts.

In the first cause of action of the amended complaint, appellee alleged:

1. A written insurance contract of appellant was issued pursuant to a municipal ordinance [Amended Complaint, Par. VII; R. 8-9].

2. On or about April 7, 1946, Roy R. Jordan rented to Sam G. Richardson, in the City of Pasadena, for a consideration, a certain Packard automobile for purposes of using said vehicle as a passenger carrying automobile, for an initial term of one week expiring April 14, 1946, and such car was in said Richardson's possession with the consent of Roy R. Jordan for said purpose on April 9, 1946 [Amended Complaint, Par. IX; R. 11].

3. The person, Sam G. Richardson, who rented the said Packard, and who drove, operated and used it on April 9, 1946, was the same and identical person that negligently drove the said car, on April 9, 1946, into and upon appellee and causing damages therefor, and against whom judgment was subsequently taken for $31,000 in the Superior Court of the State of California, in and for the County of Los Angeles [Amended Complaint, Par. XII; R. 12].

4. In appellant's answer it *admitted* that:

(a) Roy R. Jordan conducted the car rental business in the City of Pasadena, County of Los Angeles, State of California [Amended Complaint, Par. VI; R. 8; see Answer to Amended Complaint, R. 63].

(b) On February 16, 1946, appellant, for a valuable consideration, entered into and issued the said written insurance contract entitled a "Comprehensive Liability Policy," with and to the Estate of Harry E. Blodgett, deceased, and Roy R. Jordan [Amended Complaint, Par. VIII; R. 9; see Answer to Amended Complaint, R. 63].

(c) The said insurance contract was *"required"* by a certain ordinance of the City of Pasadena; that said contract was applied for, because of and issued pursuant to, under and in accordance with such ordinance; that said ordinance was, at all times herein, part of the terms, covenants and agreements of appellant in such contract; that said contract was filed with the City of Pasadena; that

thereafter, said City issued its municipal license permit, under said ordinance, to said Estate and the said Jordan for the operating of such business [Amended Complaint, Par. VII; R. 8; see Answer to Amended Complaint, R. 63].

(d) The allegations of appellee, as shown at 2 hereinabove [Amended Complaint, Par. IX; R. 11; see Answer to Amended Complaint, Par. III; R. 63].

(e) Appellee, on April 9, 1946, in the County of Los Angeles, State of California, sustained bodily injuries and suffered property damages in a collision accident; thereafter, appellee brought an action for damages for personal injuries and property damage against the said Sam Richardson and others in the Los Angeles Superior Court, being case No. 516890; thereafter the court, in said case, signed Findings of Fact and Conclusions of Law establishing that appellee had been damaged (i) on account of said bodily personal injuries in the amount of $25,000.00, and further (ii) that appellee's estate and property was "injured, wasted, destroyed, taken or carried away" in the additional sums of $4,357.00 and $1,643.00; appellee obtained judgment against Sam G. Richardson on the 12th day of September, 1946, in the sum of $31,000.00 together with interest thereon at 7% per annum until paid, together with $14.00 costs; that said judgment has become and is now final [Amended Complaint, Par. XI; R. 11; see Answer to Amended Complaint, Par. V; R. 63].

(f) The said contract was, on April 9, 1946, in full force and effect [Amended Complaint, Par. III; R. 15; see Answer to Amended Complaint, R. 65].

Appellee's Request for Admissions and Answer Thereto.

In its answers, appellant further admitted that:

(a) In Los Angeles Superior Court action No. 515192, appellant in a verified answer alleged in substance and effect that Sam G. Richardson was using and operating the said car at such time and place of the accident with the permission, consent and acquiescence of the Estate of Harry E. Blodgett, deceased, and the said Jordan [Req. No. 11, R. 70; Ans. No. 11, R. 101].

Appellee's Motion to Strike and Motion for Summary Judgment.

(a) The affidavit of J. D. Brady, in support of the motion, alleged that the official records of the sheriff's office of Los Angeles County established that Deputy Sheriff Roy Carter had served the said Superior Court summons and complaint on Sam G. Richardson on August 3, 1946 [R. 82].

The trial court made a separate and individual order striking certain of appellant's allegations which made up some alleged affirmative defenses. This order was dated April 27, 1950, and was separately entered and docketed [see R. 105-108].

No appeal has been taken from the entry of said order. The appeal was taken only from the judgment of June 26, 1950 [R. 177-178], which only is for a money amount as a result of a proceedings under Rule 56, and wherein no mention, express or implied, nor reference is made to the order striking the affirmative defenses.

Appellant's Motion for New Trial and to Set Aside Judgment.

Appellant's motion did *not* state as a basis that there is a complete or full satisfaction of judgment against Richardson in the Los Angeles Superior Court suit, case No. 516890, which is the basis here of appellee's action against appellant; rather, that a satisfaction of judgment was entered and applicable *only* to appellee's judgment against Jordan, by reason of appellant's payment to appellee of the sum of $3,500.00 as the amount of said judgment [R. 129].

The affidavit of Sam G. Richardson in support of such motions alleges: that he was involved in a collision accident on April 9, 1946, when the automobile, which he was driving, collided with a pedestrian in the vicinity of the 1200 block of San Gabriel Boulevard in the County of Los Angeles; that at said time, and for several months subsequent thereto, he operated a garage and service station at 836 South San Gabriel Boulevard, San Gabriel, California.

The counter-affidavit of C. Paul Du Bois in opposition to said motions in substance alleges: On June 7, 1946, appellee filed suit in the Los Angeles Superior Court, being case No. 515192, for damages arising out of the accident with Sam Richardson; an answer by Roy Jordan was filed in said action with verification dated June 27, 1946; said action was dismissed on July 16, 1946; that on July 18, 1946, a new suit in Los Angeles Superior Court, case No. 516890, was filed by appellee and arising out of the same casualty; Roy Jordan filed an answer thereto and verified

July 29, 1946. The law firm of Tripp, Callaway, Sampson and Dryden filed both answers; that affiant, on information and belief, alleges said attorneys were acting for appellant in affording defense to said actions. On *September 12, 1946,* in case No. 516890, the Superior Court entered judgment against Sam G. Richardson. An abstract of said judgment was recorded on *September 18, 1946,* with the Recorder of Los Angeles County. On *February 7, 1947,* the California State Department of Motor Vehicles issued and sent registered mail to Sam G. Richardson its order suspending the driver's license of the said Sam G. Richardson. Examination of the records of the Sheriff of Los Angeles County shows that (i) on February 19, 1947, a writ of execution against Richardson issued in case No. 516890, and (ii) by said Sheriff, immediately was levied on all real and personal property of Sam Richardson at 836 South San Gabriel Boulevard, and (iii) a sheriff's keeper was put in possession and charge and there continued until October, 1947, at which time personal property was transferred to storage. On March 22, 1947, appellant's counsel, Hulen C. Callaway, as representing Jordan, took a deposition of appellee. Appellee's counsel and Hulen C. Callaway, as attorney for Jordan, signed on April 22, 1947, a written stipulation and approval of form of judgment, and further both counsel stipulated in open court that appellee take judgment against Roy Jordan, as legal representative, and as executor of said estate. It is therein provided "Upon the receipt of said sum [$3,500.00] to plaintiff, his guardian *ad litem* and plaintiff's attorney are authorized to execute a satisfaction of *said* judgment

and the clerk is authorized to enter *this* judgment accordingly and to enter a satisfaction thereof when so executed." A satisfaction of judgment was filed which provides "The judgment having been paid, full satisfaction is hereby acknowledged . . . in favor of plaintiff and *against Roy Jordan.* . . ." On April 21, 1947, appellee's counsel wrote Hulen C. Callaway as attorney for Royal Indemnity and Jordan wherein it is said, in part: "It is my understanding with you that defendant Roy Jordan waives all right of subrogation against defendant Sam G. Richardson, and further *a satisfaction of judgment against Roy Jordan will not satisfy the judgment against Sam G. Richardson."* (Emphasis ours.) Thereafter Hulen C. Callaway wrote, under date of April 25, 1947, to appellee's counsel, wherein it is said in part: ". . . this is to advise that although the draft of the Royal Indemnity Company payable to George N. Olmstead . . . stated on its face, 'Dismissal with prejudice Superior Court action 516890,' *this was actually in satisfaction of judgment* of the above-numbered case *insofar as the defendant Roy Jordan*, executor for the estate of Harry E. Blodgett, deceased, as Testamentary Trustee under the Last Will and Testament of Harry E. Blodgett, deceased, *and not otherwise.* I am authorized on behalf of my principal, the Royal Indemnity Company, to *waive any right of subrogation against the co-defendant"* (emphasis ours). Municipal Court records of Los Angeles in case No. 795847, wherein the same Sam G. Richardson is a defendant, reveals a deputy sheriff served him with process in the County of Los Angeles on *January 31, 1947* [R. 149-156]. The said affidavit annexes as exhibits the abstract of judgment, as recorded, the order of suspension by the Department of Motor Vehicles, the proof of service of process upon the said Richardson in said suit by appellee in the Superior Court, etc.

Appellant's Omissions in Statements of Pleadings.

Appellant's statement of the pleadings (App. Op. Br. p. 3) is approximately correct as far as it treats the matter. Many matters are omitted which appellee deems important. The most significant are:

I. *The amended complaint—the exhibit* which is *the exact substance of* the *appellant's contract* with its named assured, the City of Pasadena, a municipal corporation, and the public, is in its original form partly typewritten and partly printed. [See Finding VIII, R. 111.] For purposes of aiding in understanding a principal basis of appellee's action, attention is respectfully directed to:

(A) The following *typewritten* portions of the contract:

(1) occupation of the named assured is that of public livery, U-Drive vehicles [R. 117] in the City of Pasadena, but residing in the City of South Pasadena [R. 51];

(2) agrees to pay, within limits of liability, with respect to bodily injury, in the amount of $15,000.00 for one person or $30,000.00 for more than one person, and with an additional $5,000.00 for property damage liability [R. 19], and that appellant received $2,503.96 as preliminary premium;

(3) that such contract coverage is "for personal, pleasure, family and business use" [R. 32];

(4) that supplementing certain provisions hereinafter to be mentioned, the appellant was to and did receive compensation for this contract on a "Gross earnings basis" of the U-Drive rental business [R. 34] wherein no mention is provided for *any* geographic area of or limitation to operating said cars rented as U-Drive within any particular locale nor is there any express or implied limitation of

any kind for the purposes of calculating appellant's compensation for said contract;

(5) the Packard vehicle, involved in this suit, is specifically designated [R. 35];

(6) the nub of the entire contract is [R. 39] provided to be, by the appellant in its own drafted language,

> ". . . it is agreed, that notwithstanding expressions inconsistent with or contrary thereto, this policy is specifically issued to cover passenger carrying automobiles rented or leased . . . or permits to be used as drive-ur-self vehicles . . . ; 'Assured' . . . shall include the driver of any vehicle insured hereunder, when driving . . . with consent; AND IN THE EVENT THAT A FINAL JUDGMENT FOR ANY LOSS OR CLAIM . . . IS RENDERED AGAINST . . . THE DRIVER OF SUCH AUTOMOBILE, [Appellant], THE INSURER GUARANTEES PAYMENT DIRECT TO THE PLAINTIFF, SECURING SUCH JUDGMENT OF THAT PART OF SAID JUDGMENT WHICH IS WITHIN THE LIMITS EXPRESSED IN THE POLICY . . . and for the purpose of enforcing *this guarantee,* an action may be commenced and maintained against the insurer by any such plaintiff." (Emphasis ours.)

Other reference is made to notice to the City Manager of the City of Pasadena in the event of election of certain termination options.

(7) Additional reference should be made, in the same typewritten paragraph, to the language ". . . this policy is specifically issued to cover . . . automobiles *rented* or leased *in the City of Pasadena.*" (Emphasis ours.)

(8) Other schedules for appellant's premiums are set out [R. 41, 42].

Attention is next respectfully directed to:

(B) The following printed portions (but appellee does not, by making this reference, contend or admit that any language, so treated or included, varies or changes the effect of the language of guaranty as set out at paragraph (6) or (7) herein-next-above):

(1) the nature of the contract is "Comprehensive Liability policy" [R. 16, 43];

(2) agrees to pay, on behalf of the person renting the car and driving with consent of the owner, ". . . all sums . . . imposed upon him by law, for damages . . . because of bodily injury . . . sustained by any person . . . and caused by accident . . ." [R. 20, 21];

(3) agrees to pay, on behalf of the person renting the car and driving with consent of the owner, ". . . all sums . . . imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident . . . and arising out of the maintenance or use of any automobile" [R. 21];

(4) further, appellant agreed to ". . . defend in his name and behalf any suit . . . alleging injury, . . . or destruction and seeking damages on account thereof, even . . . if groundless, false or fraudulent" [R. 22], and continuing ". . . all costs taxed . . . in any such suit, . . . all interest accruing after entry of judgment until the company has paid . . ." [R. 22];

(5) and further ". . . guaranteeing the insured's appearance in court . . ." [R. 22];

(6) and further ". . . reimburse . . . for all reasonable expenses . . . incurred at the company's request" [R. 22, 23];

(7) and to pay these additional items in addition to the limits of the contract [R. 23].

(8) As a definition, the person renting is deemed and treated the same as the owner within the contract terminology, namely: ". . . 'insured' includes the named insured and also . . . any person while using an owned automobile or hired automobile and any person legally responsible for the use . . . provided the actual use is with the permission of the named insured . . ." [R. 23].

(9) As to geographic area, designated "territory" by the contract, the protection afforded is ". . . within the United States . . ., its territories or possessions, Canada or Newfoundland . . . or between ports thereof . . ." [R. 24, 25].

(10) Appellant's compensation, for the contract or protection, is to be measured by:

(i) initial or preliminary payment is only estimated amount subject to subsequent determination [R. 27], at "1, Premium" and also "(2)";

(ii) definition of "cost" [R. 28] at "(3)" and "(4)";

(iii) records shall be kept [R. 28];

(iv) audit of records is provided [R. 29] at "2"; [R. 38] at "5";

(v) premium based on ". . . *total gross earnings* . . . *of all automobiles* . . ." [R. 36] at "3" and [R. 37] at "C" (emphasis ours); and additional provisions for minimum premiums, in same numbered section;

(vi) type of information to be recorded for premium purposes is: place of principal garaging, description of particular car including seating capacity, date of acquisition or transfer of particular automobile [R. 37];

(vii) number of automobiles operated [R. 38].

(11) Appellant prescribes (aside from effect of typewritten endorsement, hereinabove at I(A)(6)) with respect to "property damage," the provisions contained in paragraphs concerning and headed or entitled "Notice of Claim or Suit," "Assistance and Cooperation of the Insured," "Action Against Company," "Other Insurance" and "Subrogation" apply *only* to "BODILY INJURY" coverage and *expressly do not apply* to "PROPERTY DAMAGE" coverage [R. 47].

(12) Appellant has, apparently, attempted to define "Property Damage," at "3" of [R. 49], to be ". . . the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury . . . in any one accident . . ."

(13) Appellant's language also prescribes the contract or protection

> ". . . shall comply with the provisions of the motor vehicle financial responsibility laws of *any state or province* which shall be applicable . . . arising out of the ownership maintenance or use . . . of any automobile . . . *to the extent of the coverage* and limits of liability required . . . *but in no event in excess of the limits of liability stated in this policy* . . ." [R. 56, 57]. (Emphasis ours.)

(14) Notice of an accident may be given on behalf of the driver, and to any authorized agent; and such notice shall include identification of the driver (or driver and owner), time, place and circumstances of the accident, name and whereabouts of injured person, and available witnesses [R. 57].

(15) Notice of claim or suit is to be given to appellant [R. 57].

(16) Assistance and cooperation, is likewise provided ". . . *upon the company's request* . . ." to be given [R. 57], to attend hearings, assist in settlement, securing and giving evidence, attendance of witnesses and conduct of suits.

(17) Appellant's contract or protection runs to ". . . *any person* or organization . . . who has secured such judgment . . . shall thereafter be entitled to recover under this policy . . ." [R. 58];

(18) nor does "Bankruptcy or insolvency . . . relieve the company of its obligations hereunder" [R. 58].

Appellee's Statement of Case.

Pursuant to the Rules of the United States Court of Appeals, for the Ninth Circuit, Rule 20(c), appellee submits his statement of the case.

As appellee sees the issues, herein:

A. The trial court's judgment was and is proper because no legal error was made nor judicial discretion abused, nor has appellant shown either or both. There remained no substantial, material, genuine issue of fact to warrant the denial of Summary Judgment, or to justify, after entry and docketing of judgment, leave to amend appellant's answer.

B. The amount of the judgment was and is proper.

The issue concerning affirmative defenses contended for by appellant is not in fact here an issue, for want of taking an appeal from the Order striking that portion of appellant's answer designated affirmative defenses.

Summary of Argument.

The appellee's cause of action is based upon his state court judgment against appellant's assured for money damages for "personal injuries" and "property damage" and upon the contract of insurance involved herein which guaranteed payment of such judgment and provided that an action is maintainable directly against said insurer, under the provisions of said contract and under the laws of the State of California and the City of Pasadena.

The guarantee provisions of the contract, and it being compulsory protection as being required by an ordinance

of the City of Pasadena in order that the particular business concern might obtain a license to do or engage in such business, makes the contract a "compulsory" or "required" type of policy of insurance for the protection of the public, and to which there are no defenses to insurer's liability on the contract as a result of any subsequent act or omission on the part of the insured, such as failure to cooperate, give notice of suit, etc., to the insurer. These defenses were stricken from appellant's answer to the amended complaint, as a matter of law, leaving no genuine issues of fact to be resolved. It is immaterial that appellee was injured just outside the boundaries of the City of Pasadena as neither the ordinance nor the contract in anywise limits the place of injury to be within the city boundaries. Such protection is for the benefit of such members of the public as might be damaged by such a dangerous instrumentality being placed in the hands of an irresponsible driver, by a business concern subject to municipal licensing requirements, as a condition precedent to engaging in such business in such municipality.

Appellant's inclusion of "property damage" coverage, as an addition to bodily injury, in such contract, filed with the City of Pasadena pursuant to its ordinance, was intended by the insurer to be that the entire protection be subject to the requirements of the ordinance and the public had a right to rely thereon. Appellant had a free choice, in preparation of such contract, to limit its liability in certain particulars, but appellant did not do so. The state court judgment is in part for "property damage" and

the pleadings so admit. Such judgment hence is binding in the present action, and the property damage, so found under state law, is property herein and is covered by the appellant's policy.

Appellant here attempts, improperly, a collateral attack upon the state court judgment. It cannot be thus challenged because the judgment is valid on its face. Even if this court now could, *collaterally,* review such judgment, as for jurisdiction (and appellee submits it cannot), the record and judgment roll herein shows due and regular service of process, by a deputy sheriff, upon Sam G. Richardson.

The $3,500.00 paid by the appellant for the sole account of Roy Jordan was in satisfaction of the stipulated judgment against *him* only, *and not* for the account of the co-defendant Richardson as a separate judgment debtor. This was the explicit intention and expression of the parties, reduced to written terms, at the time the judgment was stipulated, entered and later satisfied. Further, such $3,500.00 payment would not discharge the judgment debtor *primarily* liable for a greater sum of $31,014.00, than a joint and several judgment debtor could be liable for under the $5,000.00 limitation by law of financial responsibility of driver and owner of a vehicle.

The findings of fact are all supported by the record. While some may not have been necessary to the decision, as for example, surplusage, there were no material, substantial genuine issues of fact in this case remaining as triable issues of fact.

ARGUMENT.

I.

It Was Not Error for the Court to Strike a Portion of Appellant's Answer.

The basis for the order striking the affirmative defenses of appellant (as to lack of cooperation, notice, etc.) is that appellant's contract, as filed by appellant with the City of Pasadena pursuant to the City ordinance, created a *compulsory* or *required* substance and type of insurance contract. Such contract is for the primary benefit of the public and results in a third party beneficiary contract. There are, as a matter of law, no such defenses available to the insurer, where the action is by the injured person on such contract against such insurer, for and as a result of injury suffered caused by the negligence of the insured and a judgment for damages has been rendered against such insured person.

> *Kruger v. California Highway Indemnity Exchange,* 201 Cal. 672, 258 Pac. 602, 275 U. S. 568 (cert. denied).

Appellant concedes in its brief the above point of law; it seemingly also agrees that its policy was "compulsory" except in this circumstance argues it was "voluntary" because the appellee was injured just outside the limits of the City of Pasadena.

Ordinance No. 3041 of the City of Pasadena further provides that:

> "That the owner has secured . . . an insurance policy whereby the insurer agrees to be liable for . . . injury to *any person* . . . resulting from negligence in the operation of any such drive-ur-self vehicle *by any person* . . . that said policy shall

> be deemed to comply . . . on any and all driveyourself vehicles *rented* . . . *or* used in the City of Pasadena. . . ." (Section 4(c)(5).) [R. 328.]
>
> "It shall be unlawful for any person . . . *to rent* . . . *or permit* the . . . *use* of any . . . vehicle *in the City of Pasadena* unless . . . the owner . . . is the holder of a valid . . . permit by the City of Pasadena as provided in this ordinance." (Section 2(a).) [R. 326.] (Emphasis ours.)

The ordinance additionally is regulatory in purpose over those engaging in the business of letting out of automobiles to the general public. The framers of the ordinance knew, and it is common knowledge, that such automobiles would cross the city boundaries. Such legislators wisely provided, as a condition precedent to the obtaining of a license permit to engage in the business to so rent, the requirement of depositing an insurance policy to protect *any person* who may be injured and wherever he may be situated. There is no limitation, in the ordinance, to the city streets of Pasadena. It will be noted the ordinance uses the disjunctive *"or"* throughout. The ordinance also pertains to persons, not solely as renters, but principally as *drivers*. The municipal regulation is over the conducting business of rentals in the instant case. It is not the question of extra-territoriality contended by appellant; as is expressed in:

> *Croft, Admx., Respondent v. Hall, et al., Appellants* (1946, So. Car.), 37 S. E. 2d 537.

In such case the Orangeburg city ordinance required taxicab operators to file with the city a liability insurance policy. An injured person died as result of accident outside of city.

The court (in discussing *Bryant v. Blue Bird Cab Co.*, 202 S. C. 456, 25 S. E. 2d 489) states the said case and this one are different. The Greenville ordinance (*Bryant* case) required security of licensed taxicabs for payment of damages inflicted "on the streets" and arising in the city. These provisions are not in the Orangeburg ordinance, which requires a liability insurance policy for licensing of operations on the streets of the city but does not purport to restrict the application of the insurance to the area of the city. On the contrary, the ordinance clearly contemplates the operation of the taxicabs licensed under it from points within the city to points without. . . . The result indicated is not giving extra-territorial effect to the ordinance. It was passed for the very patent purpose of providing financial protection to the users of taxis licensed by the city for transportation of the public. That such use often entails travel beyond the city limits is within common knowledge.

The power of the City of Pasadena is not restricted; as stated in Section 459(b) of the California Vehicle Code:

> "The provisions of this division (Traffic Laws) shall not prevent local authorities within the reasonable exercise of the police power from adopting rules and regulations by ordinance or resolution on the following matters. . . . Licensing and regulating the operation of vehicles for hire."

Many cases hold that an ordinance may affect indirectly the conduct of persons outside the municipality boundaries by prohibiting such persons from coming within said municipality for business transactions unless and until

certain regulatory measures are observed, certain precautions have been taken, and the preparation and safeguards completed for engaging in the particular business or transaction where such type of business or transactions are affected with a public interest or have certain aspects of the police power involved. This seems the clear rule even though a substantial portion of the transaction may be done outside the municipalities limits; such cases are:

Ebrite v. Crawford, 215 Cal. 724, 12 P. 2d 937;

In re Blois, 179 Cal. 291, 176 Pac. 449;

Korth v. Portland (1927, Ore.), 261 Pac. 895;

Covey Drive Yourself v. City of Portland (1937, Ore.), 70 P. 2d 567.

The territorial coverage of the undertaking of the insurer is *co-extensive with the area of operation* of the assured, and also *with the liability* of the assured. In full support of appellee's position the following cases are cited:

In *Utilities Insurance v. Potter,* 188 Okla. 145, 105 P. 2d 259, the policy was: issued under an ordinance, to pay for injuries to persons from operation of a motor carrier. Plaintiff was transported from Oklahoma to Virginia and to Tennessee; he was injured in both states, and recovered judgments in Oklahoma.

The court held the insurer liable even though plaintiff was injured outside of the state and that the insurer may not contend for any limitation or technical defense because the purpose of the law is to protect the public. The insurer contended that the compulsory portions of the

policy did not apply where the accident occurred outside the requiring sovereignty. The court states:

> ". . . the liability of the insurer is made co-extensive with the liability of the insured in so far as there is legal liability for damages resulting from the operation of such insured carrier . . . the general terms of the policy are applicable and include damage sustained within the territorial limits of the United States and Canada. The ultimate liability of insurer is not fixed by the provisions of the policy where a liability bond is filed as a prerequisite to the issuance of a license, neither the insurer nor the assured may successfully contend that the bond limits the liability imposed . . . we find liability to be co-extensive with the liability of the assured for damages resulting from the operation of any such assured . . . the interest of the law is to put financial responsibility behind the operator . . . as a protection to the people. . . . There is nothing in the language of either which purports to limit the liability of the damages incurred only within the boundaries of this state. The insurer would have us construe such language into the law. This we cannot do."

In *Northwest Cab v. Central,* 266 Ill. App. 192, recovery was allowed on a policy issued to comply with a legislative requirement for the purpose of securing a license to operate, even though injuries were sustained in an accident 18 miles beyond the city limits. The court stated:

> "The prime object of the statute was to protect the public by providing means by which persons injured

> by autos owned and maintained by an irresponsible owner should be enabled to collect a judgment . . . against such an owner . . . *There is nothing in the statute which . . . bars an insurance company from . . . extending its liability by its agreement* of insurance. . . . Neither in the policy are there any words limiting the territorial liability of the insurance company. Words limiting its liability could easily have been added to the policy had the defendant so desired. The policy must be construed most strictly against the company issuing it and, in cases of doubt, favorably to the insured, the public in this case." (Emphasis ours.)

None of the Massachusetts cases, cited by appellant, are here applicable, because of the express limitation in the Massachusetts law. The policies issued in those cases were under the financial responsibility laws of Massachusetts. Examination of that law, which is in Annotated Laws of the State of Massachusetts, Chapter 90, Section 34A, "Compulsory Motor Vehicle Liability Insurance," in referring to the motor vehicle liability policy, the language is ". . . and arising out of the ownership, operation, maintenance, control, or use *upon the ways of the Commonwealth* of such motor vehicle. . . ." Such policies are thus limited, *by the law,* to *the ways of the Commonwealth;* the courts, in these cases, could not apply the policies to accidents occurring off "the ways of the Commonwealth" or in other states.

II.

It Was Not Error for the Court to Grant Summary Judgment.

The findings of fact made by the trial court are correct, and find support in the record, as follows:

(a) Finding No. IV [R. 110]. The City of Pasadena ordinance [R. 325] speaks for itself, and clearly implies a declaration of public policy for simple reason it provides the condition precedent of securing a license permit to engage in the business, to rent vehicles, that an insurance contract be obtained and filed, to protect any person that may be injured by a dangerous instrumentality being placed in the possession of unskilled or incompetent persons who are financially irresponsible.

Opinion of Justices, 251 Mass. 569.

(b) Finding No. VII [R. 111]. Appellee's complaint alleges, in substance, that the insurance contract was required by said ordinance [Amended Complaint, Par. VII; R. 8]. This allegation was not denied [Answer to Amended Complaint, R. 63]. Also, see Argument (*supra*) for further reply to appellant's argument.

(c) Finding No. XIII [R. 113]. Appellee's amended complaint alleges that Roy Jordan rented, on or about April 7, 1946, in the City of Pasadena, a Packard automobile, to Sam Richardson for purposes of using said vehicle as a passenger carrying automobile for an initial term expiring April 14, 1946 [Amended Complaint, Par. IX; R. 11]. This allegation was not denied [Answer to Amended Complaint, R. 63; see also Req. 15, R. 72; Answer 15, R. 102]. Appellant's answer denies, only on

information and belief, that Sam Richardson had possession of the automobile on April 9, 1946 [Amended Complaint, Par. IX; R. 11; Answer to Amended Complaint, Par. IX; R. 63]. Appellant admits that the Packard car was in possession of Sam Richardson on April 9, 1946 [Req. No. 1, R. 69; Answer to No. 1, R. 99]; and further admits he drove, operated and used said vehicle, on April 9, 1946 [Req. No. 2, R. 69; Answer to No. 2, R. 99]. It admits there was a collision between appellee and Sam Richardson, at the time and place alleged [Req. No. 7, R. 70; Answer to No. 7, R. 100]; and that said vehicle was involved [Req. No. 5, R. 70; Answer to No. 5, R. 100]; that in Superior Court case No. 515192, appellant admitted the allegation that Sam Richardson was using and operating said automobile, at the time and place mentioned, with the permission, consent and acquiescence of the said defendant, Harry E. Blodgett [Req. No. 11, R. 71; Answer to Req. No. 11, R. 101; see also Int. No. 6, R. 89; Answer to No. 6, R. 97]. In short it is admitted Sam Richardson rented the vehicle, was in possession, drove and operated the same on the day of the accident and had the collision with the appellee. The case, cited by the appellant, *Employers Casualty Company v. Williamson,* is clearly not in point. In that case, the court *found* as a fact that the driver of the truck had a prior *limited* permission to use the truck, and was not within the scope of such permission when the accident occurred. It cannot be argued there is *any limited permission* in this case. Such rental of an automobile, for a period of a week, to a person known to live beyond the city limits where the renting occurs, gives the rentee such exclusive control for said period of time and in manner

and place used, that there is no room to argue any limitation, except perhaps to violate the law, as a narcotics offense, as illustration. Appellant cannot even suggest in what respect, or to what extent, the automobile was not being used with the permission of Roy Jordan [Int. No. 6, R. 89; Answer to No. 6, R. 97]. It has been held, as a matter of law, the renter of a car has the permissive use of it. (*Tuderios v. Hertz,* 70 Cal. App. 2d 192, 160 P. 2d 554.)

(d) Finding No. XVI [R. 113]. The caption of a complaint, as argued by appellant, is clearly no evidence and not controlling as to its substance. The body of the complaint, the evidence adduced, both of which are reflected in the judgment, determines the nature of the award for damages. The judgment in the Los Angeles Superior Court action is supported by findings of fact that appellee's estate and property was injured, wasted, destroyed, taken or carried away [Amended Complaint, Par. XI; R. 12; admitted, Answer to Amended Complaint, Par. V; R. 63].

(e) Finding No. XVII [R. 113-114]. Reference is made to argument on Finding XVI above.

(f) Finding XVIII [R. 114]. This finding is surplusage. It finds against appellant's affirmative defenses which have been stricken; however, it is supported by the record in that appellant admits on or about June 12, 1946, it received its copy of the summons and complaint served on Jordan in Superior Court case No. 515192, and wherein Richardson was a co-defendant [Answer to Int. No. 15, R. 97].

(g) Finding XXIX [R. 117]. The clear intention of the parties is shown that $3,500.00 paid, by appellant, was

on behalf of and to satisfy a judgment against Roy Jordan, and was not to extinguish nor satisfy any of the separate judgment against Richardson. Appellant has even here been credited by the trial court with such payment [R. 153-155, 177].

(h) Finding XXIV [R. 116]. Reference is made to argument on Finding XVI above.

(i) Finding XXV [R. 116]. This finding is surplusage. It finds against appellant's affirmative defenses which have been stricken; the record is, however, replete with evidentiary support [R. 88, 89, 91, 92, 94, 96, 97, 98, 72, 101].

(j) Finding XXVIII [R. 117]. Reference is made to argument on Finding XIII above.

(k) Finding XXXII [R. 118]. Common knowledge requires no evidence.

III.

Appellee's Two Judgments in Superior Court.

The Superior Court judgment against Sam Richardson remains unsatisfied. See affidavit of George N. Olmstead in support of his motion for summary judgment.

The cases on satisfaction of judgments, cited by apellants, are all *joint* tortfeasor cases, *wherein satisfaction against one discharges* the liability of the other. The policy of the law is, that an injured person can have only one satisfaction for the *injury received.* As expressed in appellant's cited case, *Cole v. Roebling Const. Co.,* 156 Cal. 443, 105 Pac. 255, the court states, ". . . the only limitation being, that he can have but one satisfaction for the *injury* that he receives . . . *the well settled rule*

is that no bar arises as to any of the *wrongdoers until the injured party has received satisfaction,* or what in law is deemed its equivalent, and *a judgment against one wrongdoer* which remains *wholly* unsatisfied *is not such satisfaction."* The damages appellee sustained were greater as against Richardson than the damages as against Roy Jordan because of the statutory limitation to $5,000.00 of liability for an owner. The injured plaintiff is entitled to full satisfaction of damages for his injury against the person causing the injury; likewise the car owner desires a satisfaction of record when he pays and discharges his statutory liability. Such was done in this case. The clear intent was to do no more. If the parties intend to keep the judgment alive, payment will not extinguish it. (*Central Bank & Trust Co. v. Cohn,* 150 Tenn. 375, 264 S. W. 641; *Tompkins v. Powers,* 106 Cal. App. 464.)

The nature of this judgment is distinguishable from that against joint tortfeasors (where there is no right of contribution). In these facts, the owner has subrogation rights against the driver. (Calif. Veh. Code, Sec. 402.) The owner becomes directly liable for the damage done by the driver, in an amount limited by the statute. Such liability is direct and several, as well as joint. Such liability is not dependent upon a judgment against the operator. It is not necessary to sue the operator if the plaintiff is satisfied with the limited judgment against the owner. (*Davidson v. Ealey,* 69 Cal. App. 2d 254, 158 P. 2d 1000.) Payment on the judgment, by the owner, is a *pro tanto* satisfaction, analogous to a surety making payment on a judgment to the limit of its bond which *pro tanto* satisfies the creditor's judgment against the principal. (*Kane v. Mendenhall,* 5 Cal. 2d 749, 56 P. 2d 498.)

IV.

The Judgment Properly Includes $5,000.00 as "Property Damage."

Appellant and its assured, by endorsement, added $5,000.00 property damage coverage to the contract required, by the ordinance of the City of Pasadena [R. 19]. This coverage took on the same character of "compulsory" or "required" insurance as the other coverage provisions of the policy upon which the public is entitled to rely. If the assured and insurer desired (i) to contract for property damage coverage without the ordinance being a part thereof, the insurer would have issued a separate policy which would not have been filed with the City of Pasadena. Appellant's liability must be measured by its policy, which was to pay $15,000.00 for personal injuries and $5,000.00 property damage (*Liberty Mutual Ins. Co. v. McDonald,* 97 F. 2d 497); or, (ii) the insurer, under the logic of the Oklahoma case (*supra*) would have exercised its rights to limit the contract accordingly. This it did not do.

The Los Angeles Superior Court judgment finds that appellee suffered damage to his property [Amended Complaint, Par. XI; R. 12]; not denied [Answer to Amended Complaint, Par. V; R. 63]. The appellant is conclusively bound by this judgment and the issues therein may not be relitigated. (*Kruger v. California Highway Indemnity Exchange, supra*). The California Supreme Court, on just this language and allegation, has broadened the term "property." (*Hunt v. Authier,* 28 Cal. 2d 288;

Moffat v. Smith, 33 Cal. 2d 905.) Appellee submits the "property damage" suffered by appellee and, as expressed in his judgment, is property and is within the meaning of appellant's contract. The writing of an insurer is construed in favor of the beneficiary, and against the insurer.

Property Damage Has Been Defined by State Law.

Section 28 of the California Code of Civil Procedure provides: "An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it." Section 654 of the California Civil Code provides property to be "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property." It therefore clearly appears that appellee has sustained, within the foregoing definitions, "property damage" and that such damage comes within the meaning of the insurance contract annexed to plaintiff's amended complaint as an exhibit. Particularly is this true in view of defendants' admissions in the pleadings as hereinbefore specified.

V.

It Was Not Error to Deny Appellant's Motion to Amend Answer. The Judgment of the State Court Is Valid on Its Face.

The allowance of amendments lies in the discretion of the trial court; refusal to permit a proposed amendment is not subject to review on appeal except on abuse of discretion. Laches and delay bars a proposed amendment.

> Moore's Federal Practice, Vol. 3, p. 833, citing:
>
> *C. E. Stevens Co. v. Foster & Kleiser Co.,* 109 F. 2d 164.

Amendment to answer, adding a new defense, is not to be allowed where such defense is clearly insufficient.

> *Canister Co. Inc. v. National Can Corp.,* 6 F. R. D. 213.

On March 15, 1950, appellant finally sought out the whereabouts of Sam Richardson [R. 137], although the cause was filed in 1948. On April 10, 1950, appellant's counsel interviewed Sam Richardson in the penitentiary [R. 134]. This cause was judicially decided April 11, 1950 [R. 167]. The summary judgment was ordered April 27, 1950, and judgment entered same date [R. 120-121]. Appellant's affidavit, in connection with the interview with Sam Richardson, was filed May 5, 1950 [R. 167]. It is submitted there is no abuse of discretion when the record clearly shows appellant's delay and dilatory action.

Much of appellee's showing in (i) his "Statement of Facts and Pleadings" herein and in (ii) the affidavit of appellee's counsel, in opposition to appellant's Motion for New Trial, is for the purpose of showing *actual* knowl-

edge by *Richardson* of the existence of appellee's judgment in the state court against him, starting with (a) the service by Roy Carter of the Summons and Complaint on August 3, 1946 [R. 159], at which time Richardson declared "Oh, that is something that happened three or four months back" [R. 161], (b) together with appellee obtaining the Writ of Execution which, by the Sheriff of Los Angeles, was levied on all of Richardson's personal effects on February 17, 1947 [R. 152], and that a sheriff's "custodian or keeper, in possession" thereunder continued regularly until about October 1, 1947 [R. 152], (c) together with the California State Department of Motor Vehicles' "Order of Suspension" of Richardson's driver's license, dated February 7, 1947, and the sending registered mail by said Department, to Richardson said "Order" on February 7, 1947 [R. 162, 163, 164]. Richardson is also chargeable with *constructive* notice by appellee's recording, with the Recorder of the County of Los Angeles, his Abstract of Judgment on September 18, 1946 [R. 330, 331]. It may reasonably be *inferred* that further *actual* knowledge came to Richardson in the obtaining of a search of title in connection with his later sublease of certain real property [R. 153] which would disclose the existence of the prior recorded Abstract of Judgment. Further, *appellant* itself had early *actual* notice that appellee was endeavoring to obtain satisfaction of his judgment against Richardson. This is evidenced by (i) counsel's letter of April 21, 1947 [R. 154, 155], and that (ii) appellee was continuing his efforts towards collection [R. 155]; (iii) that *this cause* has been pending upon appellant's removal to the Federal Court, since Sept. 24, 1948 [R. 156]. The aforesaid showings on notice were supplementary and in addition

to *this appellant's knowledge* of plaintiff's urging his claims as made in appellee's suit wherein appellant participated as early as June 12, 1946 [R. 97, at answer No. 15]. These facts are very material, in that, down to the date of the entry and docketing of this Summary Judgment herein, this appellant made *no* attempt by petition (i) in interpleader or (ii) for declaratory relief, or (iii) direct attack, (iv) or otherwise, to clear itself regarding appellee's state court judgment against Richardson [R. 95, Interrogatory 34; Answer No. 34; R. 99].

The California state rule is thus raised (even as to the argued grounds of physical omission of service of process on Richardson) that laches and estoppel is raised in a proceedings involving even *direct* attack (*Penland v. Goodman,* 44 Cal. App. 2d 14, 111 P. 2d 913, or in a direct attack by an independent action in equity (*Bouvette v. Layer,* 40 Cal. App. 2d 43, 104 P. 2d 115; *Wattson v. Dillon,* 6 Cal. 2d 33, 56 P. 2d 220; *Cadenasso v. Bank,* 214 Cal. 562, 6 P. 2d 944; *Canadian v. Clarita,* 140 Cal. 672, 74 Pac. 301; *Smith v. Jones,* 174 Cal. 513, 163 Pac. 890); where the judgment roll shows on its face service of process on a defendant, but in fact, by extrinsic evidence, it could be shown that such service was omitted or improper, it is said ". . . the motion must be made at a reasonable time or the right to make it is lost," and that one year is the maximum period within which to bring such motion.

Appellee submits that a Federal Court cannot, *on these issues,* set aside, modify or collaterally impeach a final judgment of a state trial court of general jurisdiction. (*Aldrich v. Barton,* 153 Cal. 488, 95 Pac. 900.) Any such or subsequent attack can *only* be made in *the* judicial system of the state as controlling the trial court awarding

the judgment. (*Butler v. McKey,* 138 F. 2d 373, cert. den., 64 S. Ct. 636; *Fisch v. Superior Court,* 6 Cal. App. 2d 21, 43 P. 2d 855; *Estate of Estrem,* 16 Cal. 2d 563, 107 P. 2d 36; *Gould v. Richmond,* 58 Cal. App. 2d 497, 136 P. 2d 864; *Isenberg v. Superior Court,* 193 Cal. 575, 226 Pac. 617; *Malema v. Malema,* 103 Cal. App. 79, 283 Pac. 956; *Hunt v. United,* 79 Cal. App. 2d 619, 180 Pac. 2d 460.) Only *the judgment debtor* is a party properly to attack such judgment. (*Young v. Fink,* 119 Cal. 107, 50 Pac. 1060; *Altpeter v. Postal Telegraph,* 25 Cal. App. 255, 143 Pac. 93.) Where a judgment debtor was not served with process, but knowing of the existence of the judgment based upon such error or omission in service, laches and estoppel are in issue. (*Palmer v. Lantz,* 215 Cal. 320, 9 P. 2d 821; *Altpeter v. Postal Telegraph* (*supra*); *Gardner v. Gardner,* 72 Cal. App. 2d 270, 164 P. 2d 500; *Gregory v. Ford,* 14 Cal. 138.) Actual notice is the test. (*Gardner v. Gardner* (*supra*); *Thompson v. Sutton,* 56 Cal. App. 2d 272, 122 P. 2d 975; *Wheeler v. Craig,* 206 Cal. 221, 273 Pac. 558.)

Additionally, any such attack on a judgment must show that the attacking party has a valid, bona fide defense (*Kupfer v. McDonald,* 19 Cal. 2d 566, 122 P. 2d 271), and must show in addition that a different result would obtain (*Elms v. Elms,* 72 Cal. App. 2d 508, 164 Pac. 936; *Van Teger v. Superior Court,* 7 Cal. 2d 377, 60 P. 2d 581; *Beard v. Beard,* 16 Cal. 2d 645, 107 P. 2d 385), and that a good and meritorious defense exists (*Osmont v. All Persons,* 163 Cal. 587, 133 Pac. 480); mere allegations of a meritorious defense, without a sufficient showing of

probative facts, are insufficient to constitute an allowable attack (*Brazee v. Olsen,* 116 Cal. App. 641, 3 P. 2d 68).

A judgment valid and sufficient on its face cannot be collaterally attacked (*Kaufman v. California Mining,* 16 Cal. 2d 90, 104 P. 2d 1038; *Marlanee v. Brown,* 21 Cal. 2d 668, 134 P. 2d 770; *Burroughs v. Burroughs,* 10 Cal. App. 2d 749, 52 P. 2d 606; *Rico v. Nasser,* 58 Cal. App. 2d 878, 137 P. 2d 861; *City of Salinas v. Lee,* 217 Cal. 252, 18 P. 2d 335; *Pena v. Bourland, 72* Fed. Supp. 295); and *all* presumptions are in support of the judgment (*Bennet v. Hunter,* 155 F. 2d 223; *People v. Bogart,* 58 Cal. App. 2d 831, 138 P. 2d 360; *Feig v. Bank of Italy,* 218 Cal. 54, 21 P. 2d 421), wherein it is said concerning a judgment valid on its face, the attacking party ". . . cannot now collaterally attack on the grounds urged (non-service). It is well settled that evidence outside the record is not admissible on collateral attack to show that summons was not served . . . if the fact of non-service does not appear from inspection of the judgment roll, it cannot be shown by extrinsic evidence" (*Crouch v. Miller,* 169 Cal. 341, 146 Pac. 880; *City of Los Angeles v. Glassell,* 203 Cal. 44, 262 Pac. 1084; 15 Cal. Jur. 69); no extrinsic evidence can be allowed to impeach a judgment valid on its face. (*Burroughs v. Burroughs, supra; People v. Goodhue,* 80 Cal. 199, 22 Pac. 66; *Barstow-San Antonio Oil Co. v. Whitney,* 205 Cal. 420, 271 Pac. 477; *Spahn v. Spahn,* 70 Cal. App. 2d 791, 162 P. 2d 53.) The sole remedy available to Richardson is in a new action in equity, *People v. Bogart, supra.*

A party seeking to attack a judgment must show diligence and freedom from fault. (*Wattson v. Dillon, supra; Hasner v. Skelly,* 72 Cal. App. 2d 457, 164 P. 2d 573.)

The cases cited by the appellant illustrate the rule of the Federal courts to look to the law of jurisdiction where the judgment was rendered. If a remedy is available under state law, such is applied. This court is bound by the California law, and as above stated from the California cases.

A judgment imports verity; its recitals may not be challenged in a collateral proceeding by parol testimony.

Thomas v. Hunter, 153 F. 2d 834;

Pena v. Bourland, 72 Fed. Supp. 290.

It is submitted the fact of nonservice cannot become an issue here in this case. A direct attack in the state court is the only relief open to Richardson. Even arguing, but not conceding, jurisdiction here for such purpose, there is no genuine issue of fact when the evidential source and entire strength of appellant's position is the affidavit of Sam Richardson, a convicted felon, incarcerated at the time he deposed the allegation of nonservice.

Under State Rules, Conditions Are Imposed Before Success Is Allowed to an Attack on a Judgment.

Any modification of an existing judgment cannot be unconditionally granted (*Tucker v. Tucker,* 59 Cal. App. 2d 557, 139 P. 2d 348), and such conditions imposed include ample compensation in an amount that is severe in proportion to the circumstances. (*Watson v. San Francisco,* 41 Cal. 17; *Nicol v. Weldon,* 130 Cal. 666, 63 Pac. 63; *Gray v. Lawlor,* 151 Cal. 352, 90 Pac. 691.)

Motion to Strike.

As shown earlier in this brief, appellant has not appealed from *the separate order* striking the affirmative defenses of the appellant. It would therefore appear that the inclusion in the record of those stricken defenses [to wit: (1) at page 64, on the sixth line from the top of the page, the remainder of said paragraph, starting with the phrase "further answering said paragraph . . ." and through the two word line ending ". . . by default." (2) at page 65, at "II," the paragraph starting on the first line of said paragraph with the words ". . . alleges that it was provided . . ." and continuing on through the balance of said page, and through the remainder of said paragraph as it is completed on page 66. (3) at pages 66, 67 and 68, at "I" on page 66, through the remainder of said page, all of page 67, and the first five lines of page 68, ending with the phrase ". . . prejudice of the defendant."] is improper.

Counsel has, by implication, raised the substance in his contention that the defenses should not have been stricken. Appellee, by this mention, does not waive the point that appellant has not appealed therefrom, desires only to provide against possible adverse interpretation of the Federal Rules and to contend that the trial court struck the said affirmative defenses upon any of the following sufficient theories to justify the said order.

(a) The contract of protection, annexed as an exhibit to the complaint, is "required" or "compulsory" or absolute as against the insurer (*Kruger v. California Highway Indemnity Exchange, supra*), and there are no defenses thereto.

(b) The contract, appellee's exhibit, by its terms, *guarantees* to a judgment creditor payment of the stated amounts. The very word "guarantee" is repugnant to any argument that savors of a condition subsequent; for illustration, that any act or omission of an additional insured, after the accruing of the cause of action which results in the judgment, would set at naught the third party beneficiary rights already vested as against the insurer.

Federal Rules of Civil Procedure, Rule 56.

The rule providing for summary judgment proceedings is, in part, (1) available upon all or any part of a cause (Sec. a); (2) the resisting party may use counter-affidavits (Sec. c); (3) the trial court determination thereof shall be discretionary with the court if the court concludes that the documents on file show that there is no genuine issue as to any material fact, that the moving party is entitled to judgment as a matter of law (Sec. c); (4) and may resolve liability independently of or aside from the amount of damages (Sec. c); (5) the court shall examine the documents on file, the evidence, by interogating counsel, and ascertain what material facts exist without substantial controversy as opposed to what material facts are, in good faith, actually controverted; the court shall make such disposition therein as is just.

Affidavits used in such proceedings shall be on personal knowledge, in form as to show facts which would be admissible in evidence on a trial. Certain leeway is provided so that the resisting party can fully show all claimed material facts (Secs. e, f).

Federal Rules of Civil Procedure, Rule 12.

The rule pertaining to motions, and particularly, subsection "f," pertaining to striking portions of pleading which portions are immaterial or constitute no legal issue, appears not here involved only for the appellant omitting such an appeal from its Notice of Appeal. The trial court is empowered to rule on the legal sufficiency of an affirmative defense, under such section, and has a wide discretion therein. (*De Gennaro v. Pennsylvania R. Co.* (Pa.), 68 Fed. Supp. 269; *Tivoli Realty v. Paramount Pictures* (Del.), 80 Fed. Supp. 800; *Sinkbeil v. Handler* (Neb.), 7 Fed. Rules Dec. 92; where such defenses constitute no legal issue, *Hills v. Price* (S. C.), 79 Fed. Supp. 494; *Bath Mills v. Odom,* 168 F. 2d 38, cert. denied 335 U. S. 818; *Salem Eng. v. National Supply* (Pa.), 75 Fed. Supp. 993.)

Absence of Genuineness of Issues as to Appellant.

Appellant has, in its pleadings, *i.e.,* its allegations in its answer and position taken in open court as compared to its answers given to Appellee's Requested Admissions and Appellee's Interrogatories, demonstrated such inconsistency and disregard for substantial facts that appellee contends such be sham, frivolous and insubstantial matters. These inconsistencies are illustrated as follows:

(a) The answer, at paragraph III [R. 63], answering complaint, paragraph IX [R. 11], denies, on information and belief, Richardson's possession of the auto. However, at XX [R. 99, 100, 101] possession is admitted by Numbers 1, 2, 5, 6, 7, 8, 11.

(b) The answer, at II [R. 63], denies generally and specifically appellee's paragraph VIII, as to the substance of appellant's own endorsement treated in this brief at I, A, (6), on page 9, which substance is ascertainable by a simple reading. The contract is not quesitioned. Appellee alleged, at III [R. 15], the contract to be in full force and effect. Appellant admitted [R. 65, 66] in its answer, said allegation.

(c) The answer, at IV [R. 63], generally and specifically denies appellee's paragraph X allegations that Richardson drove, operated and used the automobile on April 9, 1946, with the permission and consent of Blodgett or Jordan. Yet Appellee's Requested Admissions [R. 69] Numbers 1, 2, 3, 4, 7, 8, 11, 12, 15, all expressly or indirectly touch on such issue. Appellant's answers thereto [R. 99, *et seq.*] directly and by clear inference admit the consent and permission. Appellee's interrogatories, at [R. 89] Numbers 6, 8, 9, 11, also go to this issue. Appellant's answers thereto [R. 96] likewise directly and by clear inference admit the consent and permission.

(d) The answer, at V [R. 63], denies on information and belief, appellee's allegations, paragraph XI [R. 11], of the accident, appellee's injury and damage as a result of the collision, at the time and place when Richardson drove into appellee; yet Appellee's Requested Admissions [R. 68, *et seq.*], Numbers 5, 6, 7, 8, 11, 12, and Interrogatories [R. 87] Numbers 7, 8, 9, 15, 17, 18, 19, appellant's answers thereto admit what theretofore appellant had denied.

(e) The same circumstance exists exactly with respect to appellee's allegations, paragraph XII [R. 12], of Sam

G. Richardson being the one and the same person who rented the car, was in possession, drove and was involved in the accident, and was sued. Appellant's answers to Appellee's Interrogatories and Request for Admissions is directly to the contrary.

(f) Appellant in its answer at VIII [R. 65] expressly denied appellee's allegations of paragraph XIV [R. 13] that appellant had been compensated for any risk taken or protection afforded with respect to Richardson. Appellant answered [R. 101] Appellee's Requested Admissions, Number 13, directly to the contrary and admitted receiving full payment pursuant to the many schedules and formula as set out in the contract.

(g) Appellant specifically denies, at VIII [R. 65], the allegations of XVI [R. 13] of the complaint that appellee is an additional assured. Examination of the exhibit annexed to the complaint, at III (2) [R. 23], shows but one possible conclusion directly to the contrary.

(h) Appellant specifically denies, at VII [R. 64], appellee's allegations in paragraph XIII [R. 13] that appellant had notice of the time, place and circumstances of the collision wherein appellee was damaged, on April 9, 1946. Compare this, however, to the answer, Number 17, to Interrogatory Number 15 [R. 97] admitting notice received June 12, 1946, by appellant, setting out the time, even down to the hour, place and persons involved and extent of damage. Appellant then commenced its investigation of the entire occurrence [Interrogatory No. 16, R. 91, and Answer No. 16, R. 97]; and on December 19, 1946, appellant discussed the matter with Richardson [Answers Nos. 20-21, R. 97-98]. Appellant admits [In-

terrogatories by Appellee, Nos. 2, 3, 4, 5, 10, 28] to not having examined the investigatory records of the Police Department, Sheriff's Office, California State Highway Patrol offices, even as late as March 29, 1950 [R. 99] and April 7, 1950 [R. 102] in connection with this casualty of April 9, 1946, wherein or to which appellant had an outstanding "guarantee" undertaking. During all this time, and now appellant seeks to rely upon and stand on lack of knowledge of the facts.

(i) Appellant denies, at VI [R. 64], appellee's allegations at XV [R. 13], that appellee's judgment against Richardson is not paid nor satisfied. Appellees evades, by sham, a direct answer. See Interrogatory No. 31 [R. 95] and answer thereto, No. 31 [R. 98], and appellee's affidavit in support of motion for summary judgment.

(j) Appellant specifically denied, at VIII [R. 65], appellee's allegations, at paragraph XVI [R. 13], that appellant's undertaking included taxed costs of court, interest, as and in addition to the amount of a final judgment. But compare appellee's showing, at I (A), (2), (6), and (I) (B), (2), (3), (4), (7), (8) of "Statement of Pleadings" in this brief.

Next considering the answers to Appellee's Requested Admissions [R. 68, *et seq.*], and Interrogatories [R. 87]:

(a) Requested Admission Number 3, appellant only denies permission and consent at the instant and minute precise location of the collision between appellee, a pedestrian, and Richardson. But appellant, answering Request Number 15, admits: that the Packard automobile was rented in Pasadena, Calif., April 7, 1946, for a period of one week, expiring April 14, 1946, to Richardson; at Request Num-

ber 9, admits that as of April 7, 1946, Richardson gave to Jordan his residence address as 836 South San Gabriel Boulevard, San Gabriel, Calif.; further admits [at Requests Nos. 1, 2] that the car was a Packard automobile, 1940 model, and on the date of the accident, namely, April 9, 1946, in Richardson's possession; further admits [at Request No. 5] that the same Packard car was involved in the collision with appellee; further admits [Requests Nos. 2, 7, 8] that Richardson was the driver; further admits [Request No. 6] the collision and damages sustained was the basis of the Superior Court suit and judgment, involved here; and was so convinced of culpable wrong on the part of the registered owner, with respect to statutory liability of an owner, and identification of appellee, and of appellee being the innocent victim of said collision, as a result of an automobile covered by appellant's insurance, that appellant [Request No. 12] stipulated to judgment against Jordan in the sum of $3,500.00 and paid said sum, all as an aftermath of this collision; further admits [Request No. 11] that appellant prepared a verified pleading of answer wherein consent and permission by Jordan extended to the time and place involved, for the Packard automobile in question. In response to Interrogatory Number 6, appellant admits it has no claim of knowledge or theory that the Packard was not being operated with the permission and consent of Jordan at the certain time and place. Yet, during this same period, appellant admits [Interrogatory No. 27] to having seven full-time investigators.

(b) Appellant pleads ignorance of the conduct or use of automobiles rented by Jordan, in the sense of where they are driven, while such automobiles are in the hands

of some rentee [Interrogatory No. 33], yet the examination of the contract prepared and delivered by appellant, annexed as an exhibit to the complaint, shows the automobiles to be rented by Jordan as drive-ur-self or U-drive types.

(c) Appellant makes claim that it had no opportunity to learn the facts of the accident or participate in the defense of Richardson. Appellant did receive full cooperation from Jordan [Requested Admission No. 14, Interrogatory No. 24] as the bailor or lessor of the car, received about June 12, 1946, the summons and complaint which indicated the driver, Richardson, was also a co-defendant with Jordan; that appellant was thereafter active and participating in said case [Requested Admission No. 12] and investigated promptly the circumstances [Interrogatory No. 16; appellant talked with Richardson, the driver, about the accident about December 19, 1946 [Interrogatory No. 20], but appellant never requested Richardson's assistance, personal attendance or cooperation within the terms of the insurance contract [Interrogatories Nos. 21, 23]; that as a result of the conversation with Richardson, appellant developed no facts nor information which would have, through Richardson, assisted them in their defense [Interrogatory No. 22].

(d) Appellant admits that it made no attempt, in 1946, or thereafter, to perform its duty of defense on behalf of Richardson [Interrogatory No. 30] nor to take any steps to intervene, save or protect the liability of Richardson nor of appellant prior to appellee's motion for summary judgment [Interrogatory No. 34]; and that nothing has developed which in any wise prejudices appellant [Interrogatory No. 26] under its voluntary contract of guar-

anteeing responsibility to such persons as might be damaged and who thereafter recover a final judgment.

Appellee submits that in a determination of the appellate issues of a summary judgment, and the determination of the genuineness of the claimed factual issues, the court can and indeed should examine the claims and positions of the appellant, to consider not only what was said or pleaded, but also how it was said and the basis of the statement. Appellee feels that he has herein demonstrated the insincerity of the issues contended by appellant and that no substantial issue exists.

Summary Judgment Under Rule 56, F. R. C. P.

The purposes pertinent here of the Federal provisions for summary judgment are (a) to expedite litigation, (b) to avoid trials of unnecessary factual issues, (c) to avoid unnecessary lengthy trials on such issues, (d) to ascertain if, in fact, substantial material, genuine issues of fact remain and are controverted, (e) to do justice under a proper case. A trial court, on such a proceeding, has certain wide, judicial discretion.

Rogers v. Girard Trust (Ohio), 159 F. 2d 239.

A trial court thus is empowered to examine all filed pleadings and documents, and to consider all the allegations, statements and positions of the contending parties, for the purpose of a penetrating and piercing over-all analysis of a litigant's position and status, the effect thereof, and the consequences. This judicial right in the case at bar has in it, the inherent further scope of looking to the evidential sources of appellant's claims or allegations, in order to obtain judicial perspective and objec-

tiveness in evaluating and determining the situation and status of this same litigant. (*Pen-Ken Gas v. Warfield* (Ky.), 137 F. 2d 871; cert. den., 320 U. S. 800, 88 L. Ed. 483.)

The objective of this judicial deliberation is principally to determine if a genuine, substantial issue of fact further exists as should entitle a trial on the merits of a factual question (*Roepke v. Fontecchio* (Cal.), 177 F. 2d 125; *Christianson v. Gaines* (D. C.), 174 F. 2d 534; *Finlay v. Union Pacific,* 6 F. R. D. 284) as to squeeze out immaterial or insubstantial matters. (*Bellanger v. Hodeman* (Me.), 6 F. R. D. 459.

The judicial determination of this issue may be contrary to and despite the formal pleadings of this same litigant. (*Pen-Ken Gas v. Warfield, supra; N. Y. Life v. Cooper* (Okla.), 167 F. 2d 651; cert. den. 335 U. S. 819.)

In general support of this same proposition (*Town of River Junction v. Maryland* (Fla.), 110 F. 2d 278, cert. den. 310 U. S. 634; *Porter v. Jones* (Okla.), 176 F. 2d 87; *Griffith v. Wm. Penn* (Pa.), 4 F. R. D. 475), liability may be thus concluded with damages to be subsequently assessed. (*Truncale v. Blumberg,* 8 F. R. D. 492.)

This judicial prerogative, from the authorities, appears to extend to the trial court's conclusion from all the record (*Battista v. Horton, Myers & Raymond* (D. C.), 128 F. 2d 29; *Continental Illinois Nat'l Bank v. Ehrhart* (Tenn.), 1 F. R. D. 199) *as to the over-all effect of the entire matter* considered (*Burnham Chemical v. Borax* (Cal.), 170 F. 2d 569, cert. den. 336 U. S. 924; *Pofe v. Continental Insurance* (Ill.), 161 F. 2d 912, cert. den. 332 U. S. 824; *Gifford v. Travelers Protective* (Cal.), 153 F.

2d 209; *Keele v. Union Pacific* (Cal.), 78 Fed. Supp. 678; *Bowles v. Batson* (S. Car.), 61 Fed. Supp. 839, affd. 154 F. 2d 566; *Sprague v. Vogt,* 150 F. 2d 795; *Cohen v. 11 W. 42nd St.* (N. Y.), 115 F. 2d 531; *Seward v. Nissen,* 2 F. R. D. 545; *La Salle v. Kane* (N. Y.), 8 F. R. D. 625; *Ortiz v. National Liberty* (Puerto Rico), 75 Fed. Supp. 550; *Dickinson v. Mellas* (Ill.), 81 Fed. Supp. 626; *Nostrand v. U. S.* (N. Y.), 59 Fed. Supp. 245) and in spite of (1) the allegations in the answer of this particular appellant to the contrary, (2) the feigned or colorable issues contended to be framed in the pleadings (*Griffith v. Wm. Penn, supra*), (3) this appellant's claim of the existence of a factual issue or a need to take testimony to resolve an issue, which in fact is not a real or substantial issue. (*Loughman v. Braun* (N. Y.), 43 Fed. Supp. 315.)

A further purpose of such proceedings is to escape trial of issues where they are only frivolous or sham. (*U. S. v. Conti* (N. Y.), 27 Fed. Supp. 756.)

Where it is (a) clear what the truth is (*Butcher v. United Electric* (Ill.), 174 F. 2d 1003); *Crosby v. Oliver* (Ohio), 9 F. R. D. 110), and (b) there is non-existence of facts sufficient to constitute a defense (*Kelly v. R. F. C.,* 172 F. 2d 865), or (c) where the claimed factual issue sought to be tried is immaterial (*Finlay v. Union Pacific* (Kan.), 6 F. R. D. 284), or (d) is insubstantial (*Toebelman v. Missouri-Kansas Pipe,* 130 F. 2d 1016; *Cohen v. 11 W. 42nd St., supra*), as (e) to leave no room for legitimate controversy, then a (1) mere pleaded denial, as the general issue, or as a (2) conclusion of law (*Norton v. Fairclough* (N. J.), 72 Fed. Sup. 308; *Garrett v. American University* (D. C.), 163 F. 2d 265), or a (3)

denial in form, but inconsistent substance by way of comparison to an uncontroverted exhibit (*La Salle v. Kane, supra*), is insufficient to resist or overcome a motion for summary judgment. (*Piantadosi v. Loews* (Cal.), 137 F. 2d 534; *Kelly v. R. F. C., supra; Imported Liquor v. Los Angeles Liquor* (Cal.), 152 F. 2d 549; *Carr v. Goodyear Tire* (Cal.), 64 Fed. Sup. 40; *Schreffler v. Bowles* (Colo.), 153 F. 2d 1, cert. den. 328 U. S. 870; *Averick v. Rockmont* (Colo.), 155 F. 2d 568.) To resist such a motion, after appellee had shown a *prima facie* entitlement to judgment, appellant must specify, justify and show substantial, admissible, competent evidence (*Seward v. Nissen* (Del.), 2 F. R. D. 545) in support of its position, as to constitute plausible grounds for its defense, which would tend to change the result (*Pen-Ken v. Warfield, supra; Gifford v. Travelers, supra;* Federal Rules Civil Procedure, Rules 12a, 60b; *Bowles v. Branick,* 66 Fed. Supp. 557; *Clare v. Farrell* (Minn.), 70 Fed. Supp. 276; *Jameson v. Jameson* (D. C.), 176 F. 2d 58) and would be reasonable, or not incredible, or not without probative force when accepted by reasonable minds (*Miller v. Miller* (D. C.), 122 F. 2d 209; *Whitaker v. Coleman* (Ala.), 115 F. 2d 305). Appellant made no request for additional time to garner facts within the meaning of *Stanolind Oil v. Doyle* (Tex.), 38 Fed. Supp. 893, aff'd 123 F. 2d 900, and cannot now complain of the disposition by summary judgment. (*Rothberg v. Dodwell* (N. Y.), 152 F. 2d 100.)

Where, as here, appellant failed to oppose appellee's motion for summary judgment by any counter-affidavits or any showing of facts, then all of appellee's showing is taken as true for the purposes of the motion. (*Wolfe v. Union Transfer* (Ky.), 48 Fed. Supp. 855; *Allen v. R.*

C. A. (Del.), 47 Fed. Supp. 244.) As appellee views this effect, there was therefore, or can be, no contention by appellant that any genuine factual issues remained. Said another way, appellant admitted (*Allen v. R. C. A.,* 47 Fed. Supp. 244; *Port of Palm Beach v. Goethals* (Fla.), 104 F. 2d 706) there was, then and there, no remaining factual issue. In the particular facts here, where appellant controlled the defense in the state court action wherein appellee as plaintiff took his judgments against Richardson and others, which Richardson judgment is here a basis of appellee's action against appellant, the bar of *res adjudicata* against appellee, is available to appellee, and appellee urges said bar to its complete extent under the rules pronounced in *Herzog v. Des Lavriers Steel* (Pa.), 46 Fed. Supp. 211, to entitle appellee to his summary judgment being affirmed. (See also *Eller v. Paul Revere Life Ins. Co.,* 138 F. (2d) 403; *Gifford v. Travelers* (Cal.), 153 F. 2d 209; *American Insurance v. Gentile* (Fla.), 109 F. 2d 732, cert. den. 310 U. S. 633; *Belanger v. Hopeman* (Me.), 6 F. R. D. 459.) As was shown in the paragraph next preceding, a denial, without more, is insufficient. Certainly, since Rule 56 provides certain requirements to be embodied in an affidavit (*Engl v. Aetna* (N. Y.), 139 F. 2d 469) to oppose such a motion (*Walling v. Fairmont Creamery* (Neb.), 139 F. 2d 318; *Seward v. Nissen, supra*), argument by appellant's counsel cannot, unaccompanied by such affidavit (*Fishman v. Teter* (Ill.), 133 F. 2d 222), constitute a sufficient or any showing of the existence of any genuine or substantial issue of fact, as to defeat the motion. Appellee is, therefore, entitled, as a matter of law, to his summary judgment. (*Home Art v.*

Giensder (N. Y.), 81 Fed. Supp. 551; *Fletcher v. Krise* (D. C.), 120 F. 2d 809, cert. den. 314 U. S. 608.)

Other matters available to a trial judge on a hearing on such a motion are: (a) verified pleading of the resisting party in a prior suit (*Eberle v. Sinclair Oil* (Okla.), 35 Fed. Supp. 296, aff'd 120 F. 2d 746), and, of course, judicial knowledge and common knowledge (*Fletcher v. Evening Star* (D. C.), 114 F. 2d 582, cert. den. 312 U. S. 694). On such a motion, appellant as the resisting party must disclose fully existence of issues, if any, and what the evidence will be in support of such issues if they were to be tried (*Carr v. Goodyear, supra*), and fully reveal its technical position by shedding any light on the meaning of allegations of its answer or issues as would be opposition to the motion. (*Bowles v. Ward* (Pa.), 65 Fed. Supp. 880.)

The trial court is empowered to determine summarily if no further genuine issue exists, on such showing as was made. (*Pen-Ken v. Warfield, supra; Byron-Jackson v. U. S.* (Cal.), 35 Fed. Supp. 665; *Fox v. Johnson* (D. C.), 127 F. 2d 729.) It is settled law that the trial court is presumed to have acted correctly in its disposition, at least until the contrary is shown; no probable error, in the trial court's judgment, is here made to appear. (*Carr v. Goodyear, supra.*)

A trial court, in disposing of such a motion, may, but is not, required to provide Findings of Fact in support of its judgment. (*Lindsey v. Leavy* (Wash.), 149 F. 2d 899, cert. den. 326 U. S. 783; *Prudential v. Goldstein* (N. Y.), 43 Fed. Supp. 767; *Jarrett v. Norfolk,* 74 Fed. Supp. 585, affd. 169 F. 2d 409, cert. den. 335 U. S. 886.)

Inasmuch as each case varies in its circumstances, the peculiar facts control disposition in the Appellate Court of the judgment awarded on motion for summary judgment. (*Pen-Ken v. Warfield, supra; Calif. Apparel v. Wiedner* (N. Y., 68 Fed. Supp. 499, affd. 162 F. 2d 893.)

Further, a summary judgment is available to all or part of appellee's suit. (*McDonald v. Batopilas* (N. Y.), 8 F. R. D. 226.) If any portion hereof is severable from any other, disjunctive appellate consideration appears proper.

Appellant's Affirmative Defenses, Under These Facts, Constitute No Legal Defense.

All of the affirmative defenses, sought by appellant to be included as factual issues framed in its answer to appellee's amended complaint, are, principally, as questions of law, no defenses under the peculiar facts of this case.

Appellant has pleaded want of knowledge, lack of notice, omission of forwarding Summons and Complaint, lack of cooperation, omission of attendance, etc., and such technical types of legal defenses as appellant chose to include in the printed portions of its contract under "Conditions" at R. 57, *et seq.* Appellee has collected a very great number of authorities on such questions. These issues are inapplicable to a type of contract as a "compulsory" or "required" insurance but which may, in a proper case, be applicable in the ordinary insurance contract as is not required or compulsory. Unless this court feels they would be helpful, appellee does not now desire to add to this already lengthy brief, the citations in detail on those propositions, but appellee will cite merely text references where all of such defenses are discussed and the non-applicability, here, of such questions is shown. The

factual circumstances, wherein such defenses are not applicable, are contained in the record and are principally set out in appellee's "Request for Admissions" and "Interrogatories" and appellant's answers thereto, and among others include:

(a) An insurer has definite duties to defend those protected within its contract, 45 C. J. S. 1054, Sec. 932, notes 73 74, 77-79; 1055, Sec. 933, and three courses, among others, are open to an insurer to avoid its unanticipated liability. (1) to defend, (2) to settle and (3) to pay to the entitled party the amount provided in the contract, and where the insurer omits its provided defense, such excuses compliance with the cooperation provision, 45 C. J. S. 1060, Sec. 933, note 38;

(b) The cooperation provision is designed to prevent collusion, 45 C. J. S. 1062, Sec. 934b and note 64. Cooperation is due *only when requested* by the insurer, 45 C. J. S. 1065, Sec. 934, note 76;

(c) An insurer is bound to assert all efforts to ascertain facts, as would a reasonably prudent person. 45 C. J. S. 1065, note 77;

(d) Failure of compliance with a cooperation clause is immaterial unless substantial prejudice results to the insurer. 45 C. J. S. 1065, note 80; p. 1067, Sec. 934, note 87;

(e) In the absence of an express request by the insurer to a party to cooperate, the insurer has no defense. 45 C. J. S. 1067, note 91;

(f) Notice of claim or suit is unnecessary where the insurer has actual knowledge, 45 C. J. S. 1215, Sec. 983, note 46, and technical notice is immaterial where the insurer has actual notice and a third party beneficiary's

rights have vested. 45 C. J. S. 1273, Sec. 1047, note 86; 46 C. J. S. 123, notes 9, 10, 11;

(g) Omission of notice or forwarding of process by an additional assured is immaterial unless the insurer shows substantial prejudice. 45 C. J. S. 1275, note 97; Sec. 1051, note 3;

(h) Any reasonable notice, by *any* person, within a reasonable time under all the surrounding circumstances fulfills the provision. 45 C. J. S. 1277, Sec. 1053, notes 15-16;

(i) Delay of notice or forwarding of process or omission of forwarding of process is immaterial excepting where the insurer shows substantial prejudice. 45 C. J. S. 1278, Sec. 1055; p. 1279, note 31; 46 C. J. S. 123, note 2. Such prejudice to an insurer must be actual. 45 C. J. S. 1278, Sec. 1055; p. 1279, note 31;

(j) The ignorance of a duty, if any, by an additional assured excuses his compliance with the technical provisions of the policy. 45 C. J. S. 1282, Sec. 1056b, and to constitute any real grounds of defense, an omission in compliance must be substantial and material. 45 C. J. S. 1284, Sec. 1057, note 70;

(k) The circumstances of the particular case justify or refuse the waiving of the application of these requirements. 45 C. J. S. 1286, note 94;

(l) An investigation promptly commenced by an insurer is sufficient to waive compliance with respect to notice. 45 C. J. S. 1287, Sec. 1061, notes 10-11;

(m) Where the contract creates third party beneficiary rights no act or omission by the contracting parties, subsequent to the vesting of a beneficial interest, can destroy

said vested benefits. 44 C. J. S. 543, note 91; 46 C. J. S. 120, Sec. 1191(6), and p. 120, note 86; p. 122, notes 4, 5; p. 123, note 2; p. 123, Sec. 1191, notes 7-11;

(n) Where the insurer has actual notice of the pendency of the action and has the opportunity to protect itself against untoward or unanticipated liability of the assured, no defense is available for want of notice. 46 C. J. S. p. 257, Sec. 1251, and note 17; p. 258, note 18.

(o) A judgment against the assured is conclusive against the insurer in a later action, 46 C. J. S. 257, n. 19; such prior action determines the liability of the insured, consent, etc., and therefore determines the liability of the insurer. (46 C. J. S. 258, n. 21-22.]

(p) Where the insurer participates in the defense of a case instituted against the insured and an additional insured, and wherein the insured cooperates with the insurer, then the insurer is estopped from raising non-cooperation, on the part of the additional insured, as a defense. (46 C. J. S. 258, n. 21, 22; 260, n. 32; 260, n. 34.)

(q) The test is when does the insurer have the opportunity to control the defense of the action. (46 C. J. S. 260, n. 34.)

(r) There is no presumption of bad faith on the part of an assured or additional assured, 46 C. J. S. 458, n. 48, and the presumptions are in fact against the insurer. (46 C. J. S. 459, n. 59-62; 44 C. J. S. 1180, Sec. 297, n. 70; 1186, n. 91.)

(s) Appellee submits that, within the meaning of the authorities, appellant has had substantial performance to it of all such matters. No prejudice did or could result to appellant.

Conclusion.

For the reasons hereinbefore discussed, appellee submits that the judgment, as entered, is proper and correct from the aspects of either the facts or the law. The judgment should be affirmed.

Respectfully submitted,

C. Paul DuBois,

Attorney for Appellee.